THE RIGHT OF PERSONAL LIBERTY.

SPEECH

OF

HON. MILTON SAYLER,

OF HAMILTON COUNTY,

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Mr. DRESEL'S Resolutions as to arbitray arrests being under consideration, Mr. SAYLER said:

MR. SPEAKER: The wide range which this debate has assumed, has almost caused us to lose sight of the questions properly involved. For prudential reasons it is perhaps well enough that the resolutions of the honorable member from Franklin (Mr. Dresel) have afforded an occasion to certain gentlemen for giving vent to smoldering campaign speeches, whose suppressed burning and smoking might else have produced consequences terrible to contemplate. It is well enough, too, that this House and "the rest of mankind," have thus been enlightened by their views of the object and purpose of the war, of the mode of its successful prosecution, of the great and crying sin of slavery, of its abolition by Executive proclamation, and of the nature and character of the coming year of jubilee. All this, sir, is well enough, but none of all this is involved in the subject matter properly before the House for discussion. Nor is it necessary in this debate to resort to questions foreign to the resolutions. The issues directly involved are broad enough, embracing, as they do, the great absolute right of PERSONAL LIBERTY to the American people. I propose therefore in what I shall say to confine my remarks to the two-fold right asserted by the President and impliedly denied by the resolutions, the right, first, to arrest without process of law, and second, to detain without benefit of *habeas corpus*, free citizens of the State of Ohio not connected with the military service of the country. In doing this I desire to appeal neither to the passions and prejudices of men nor to their partisan feelings, but alone to their sober judgment in the light of history and of the hitherto uniform interpretation of our constitutional law.

It appears, in the course of this discussion, as a matter of fact admitted upon all-hands, that eleven free citizens of the State of Ohio not connected with "the land or naval forces, or in the militia in actual service," have been "seized" without "warrant," "held" without "presentment or indictment," and denied "the right to a speedy and public trial by an impartial jury of the State;" and that they have not been "informed of the nature and cause of the accusation," nor "confronted with the witnesses against them." And it further appears that three of the eleven have been "transported out of the State" for a supposed "offense committed within the same," and imprisoned elsewhere.

These extraordinary proceedings, so contrary to all our preconceived ideas of the rights of the citizen, and so utterly at variance with all previous practice in this country, are founded upon a supposed power resident in the Chief Executive of the nation, a power which the present incumbent of that office himself distinctly claims, and which is now asserted and defended, and the exercise of which is justified by the Republican leaders upon the floor of this House.

In his message of July 4, 1861, the President of the United States claims for himself and for those whom he may see fit to invest with the same authority,

the right, "according to his discretion to suspend the privilege of the writ of *habeas coopus*, or, in other words, to arrest and detain, without resort to the ordinary processes and forms of law, such individuals as he might deem dangerous to the public safety." This power he had previously exercised, and this power he continued to exercise to some extent, though it did not find its complete and final assertion until the issue of the proclamation of September 24, 1862. This most remarkable executive document orders:

"First. That during the existing insurrection, and as a necessary measure for suppressing the same, all rebels and insurgents, their aiders and abettors within the United States, and all persons discouraging volunteer enlistments, resisting militia drafts or guilty of any disloyal practice, or offering aid and comfort to the rebels against the authority of the United States, shall be subject to martial law, and liable to trial and punishment by court martial or military commission.

"Second. That the writ of *habeas corpus* is suspended in respect to all persons arrested, or who are now, or hereafter, during the rebellion, shall be imprisoned in any fort, camp, arsenal, military prison, or other place of confinement, by any military authority, or by the sentence of any court martial or military commission."

This proclamation and the orders of the Secretary of War promulgated two days thereafter, to carry out its purposes, providing for the appointment of a Provost Marshal General, whose headquarters shall be at Washington, and of special Provost Marshals for each State, and defining their duties, not only suspend the privilege of the writ of habeas corpus, but trample upon the provisions of our State Constitutions, annul the laws of the States, create and define new and hitherto unknown offenses, dispense with the forms and processes of the judiciary, erect in their stead military commissions appointed and paid by the President, clothed with power to arrest and imprison or otherwise punish at their discretion the citizen for such acts committed or omitted, as the Chief Executive may be pleased to call offenses, establish a system of espionage throughout the United States, and thus place every citizen under the immediate military command and control of the President, and the liberties of every citizen, without the possibility of a judicial investigation, at the mercy of irresponsible agents, who may be instigated by political prejudice, personal malignity, or by the mere wantonness of unusual and arbitray power, to take them away.

This unsurpassed body of tyranny may seem harmless or trifling to those who enforce it, and to their friends and supporters, but not so, sir, to those who are or may be its victims. Nor is it satisfactory that we have been assured by the apologists of arbitrary power upon this floor that the arrests have ceased, the occasion for them having passed away. I could wish for the honor of my country that they had ceased, but the facts are otherwise. And even if they had, it is not this or that particular application of power of which a free people should be jealous, but the existence of the power itself and the uses of which it is susceptible. The proclamation to-day stands unrevoked, the orders under which its provisions are to be effected stand uncancelled, and thus this assumed authority on the part of the President, with the means of carrying it into execution, hangs to-day over the heads of the heretofore free citizens of the State of Ohio, and of the other States of the Union.

Certainly so extraordinary power, over-riding as it does all the liberties hitherto guaranteed to the citizen, must have some firm basis, and could not have been assumed by the President except for very grave reasons, and upon assurance made doubly sure that he was entitled to its exercise. He shall speak for himself. In his message, referred to before, to the extra session of Congress, he thus announces his reasons and argues his right.

"Of course some consideration was given to the question of power and propriety, before this matter was acted upon. The whole of the laws which were required to be faithfully executed, were being resisted and failing of execution in nearly one-third of the

States. Must they be allowed to finally fail of execution, even had it been perfectly clear that by the use of means necessary to their execution, some single law, made in such extreme tenderness of the citizen's liberty, that practically it relieves more of the guilty than of the innocent, should, to a very limited extent, be violated? To state the question more directly, are all the laws *but one* to go unexecuted, and the Government itself go to pieces lest that one be violated? Even in such a case, would not the official oath be broken if the Government should be overthrown, when it was believed that disregarding the single law would tend to preserve it? But it was not believed that this question was presented. It was not believed that any law was violated.

"The provision of the Constitution, that the privilege of the writ of *habeas corpus* shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require it, is equivalent to a provision—is a provision—that such privilege may be suspended when, in case of rebellion or invasion, the public safety does require it. It was decided that we have a case of rebellion, and that the public safety does require the qualified suspension of the privilege of the writ, which was authorized to be made. Now it is insisted that Congress, and not the Executive, is vested with that power. But the Constitution itself is silent as to which or who is to exercise the power; and as the provision was plainly made for a dangerous emergency, it cannot be believed the framers of the instrument intended that in every case the danger should run its course until Congress could be called together; the very assembling of which might be prevented, as was intended in this case, by the rebellion."

Now I will do the President the justice to say, that in these few words he has suggested every argument and assigned every reason for his action that his apologists in this House have been able to suggest or assign, and I will do them the justice to say that no one of them has suggested weaker arguments or assigned less satisfactory reasons. Analyzing the arguments of the President and the arguments that have been made in his behalf in the course of this discussion, they are found to be two-fold: one class asserting that he is possessed of this power under the Constitution and by virtue of its provisions, and another that he is possessed of it by virtue of an authority inherent in him as Chief Executive of the nation and Commander of its military forces, which overrides all constitutions and all laws, and is based upon the necessities of the people and the safety of the nation,—a revival of the Roman maxim, *Salus populi, suprema lex.*

No more grave or important subject than this can possibly agitate the public mind, and the time has come when the people of this country should thoroughly understand those great principles of civil liberty of which noble men have dreamed in all ages, and which have been transmitted to us as our common birthright by the self-devoted efforts and struggles, at the cost of the blood and treasure of our Saxon ancestors through a period of a thousand years.

There are three great absolute rights of man—the right to life, to liberty, and to property. These belong to man as man, and not by virtue of laws or political institutions. It is the image in which God created him. The charter on which they depend was drawn from the skies, and bears the signet and stamp of Heaven. Any encroachment upon these rights, except by the consent of the people, is tyranny; and it is against such encroachment that those who would be free have struggled in all ages. To preserve and maintain these rights is the primary end of human laws, and constitutes the great purpose for which governments have been instituted among men. Life, Liberty, Property, these three, but the greatest of these is Liberty. To a race of noble men property has no value without freedom, and life is too dear when purchased at the price of slavery.

What then constitutes this great right of personal liberty to the individual? I quote the definition of the illustrious and learned commentator of English Law. It consists, says Blackstone, "in the power of locomotion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; *without imprisonment or restraint, unless by due course of law.*" Further on in

the same connection, he says: "Of great importance to the public is the preservation of this personal liberty; *for if once it were left in the power of any, the highest magistrate, to imprison arbitrarily whomsoever he or his officers thought proper, there would soon be an end of all other rights and immunities.* Some have thought that unjust attacks, even upon life or property, at the arbitrary will of the magistrate, are less dangerous to the commonwealth than such as are made upon the personal liberty of the subject. To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom; but confinement of the person, by secretly hurrying him to goal, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary governments."

Now I am ready to admit, Sir, that in times of great peril to the commonwealth, when the State is in real danger, it may be necessary to abridge the rights and immunities of the citizen, and to restrain to a certain extent his personal liberty. This has been done under such circumstances in all free governments, and may be done in our own. I admit that our government to-day is in great peril, and that our national life is at stake. But I affirm in opposition to the arguments and assumptions of the President, and in opposition to the arguments and assumptions of his apologists here, that the power thus to abridge the personal liberty of the citizen is vested exclusively in the LEGISLATIVE and not at all in the EXECUTIVE department of the government either of the United States or of the State of Ohio, and that even Congress or the Legislature can exercise this power only within definite and well-understood limitations and restrictions. And this first proposition I propose to establish by the history of the right and the doctrine concerning it in England, whence we have derived it, by the express words and the context of our Federal Constitution, and by the hitherto uniform decisions of our courts of justice.

The right of personal liberty is an ancient one and bears the honors of many a century. It dwelt with the Greeks in the days of their glory, and with the Romans when they were free and pure. In turn they were enslaved, and their lost liberties became the portion of our rude Saxon ancestors who had made their way into Britain. It is the proud boast of English jurists that the three great absolute rights of the individual, constituting their liberties, are coeval with their form of government. From the beginning of the fifth to the beginning of the thirteenth century, however, amid the strifes of the Heptarchy, the invasion of the Danes, and the conquest of the Normans, even though Egbert and Alfred had lived and ruled, English history presents little else than a scene of anarchy and confusion. It was at Runnymede, on the 15th day of June, 1215, that the nation's liberties received their first definite recognition, and were put forever under the protection of law. After a century and a half of conquest the Barons had become worse Normans and better Englishmen, and strengthened by the support of the Monks, at whose head was that true Anglo-Saxon, Stephen Langton, Archbishop of Canterbury, they then and there compelled King John to accede to their demands, and to guarantee to the people the privileges and immunities recited in the Great Charter; in the 29th chapter of which it is thus written:

"NULLUS LIBER HOMO CAPIATUR, VEL IMPRISONETUR, AUT DISSEISIATUR DE LIBERO TENEMENTO SUO VEL LIBERTATIBUS VEL LIBERIS CONSUETUDINIBUS SUIS, AUT UTLAGETUR, AUT EXULET, AUT ALIQUO MODO DESTRUATUR, NEC SUPER EUM IBIMUS, NEC SUPER EUM MITTEMUS, NISI PER LEGALE JUDICIUM PARIUM SUORUM, VEL PER LEGEM TERRÆ. NULLI VENDEMUS, NULLI NEGABIMUS, AUT DIFFEREMUS, RECTUM VEL JUSTITIAM."

(No freeman shall be arrested or imprisoned or deprived of his own free house-

hold, or of his liberties, or of his own free customs, or outlawed, or banished, or injured in any manner, nor will we pass sentence upon him, nor send trial upon him, *unless by the legal judgment of his peers or by the law of the land.* To no one will we sell, deny, or delay, right or justice.)

Magna Charta is the great fact of English history. It is the pure fountain whence the streams have flowed, by which so many generations of men have been gladdened and blessed. Saxon liberty, so long in abeyance, now became a definite and tangible possession. Henceforth, before the majesty of written law, there was neither lord nor vassal, Norman nor Saxon. The cottage was protected equally with the castle, and the rights of the humblest freeman were as sacred as those of the proudest baron. It is a noble feature of the great charter that it lifted from the shoulders of the masses many a burden "grievous to be borne," and distributed civil rights equally to all classes of freemen; but in the words of Hallam, the most judge-like of historians:

"The essential clauses of Magna Charta are those which protect the personal liberty of all freemen, by giving *security from arbitrary imprisonment and arbitrary spoliation.* It is obvious that its words, interpreted by any honest court of law, convey an ample security for the two main rights of civil society. From the era, therefore, of King John's charter, it must have been a clear principle of our constitution, *that no man can be detained in prison without trial.* Whether the courts of justice framed the writ of Habeas Corpus in conformity to the spirit of this clause (Cap. XXIX), or found it already in their register, it became from that era *the right of every subject to demand it.* That writ, rendered more actively remedial by the statute of Charles II., but founded upon the broad basis of Magna Charta, *is the principal bulwark of English liberty; and if ever temporary circumstances,* OR THE DOUBTFUL PLEA OF POLITICAL NECESSITY, *shall lead men to look on its denial with apathy, the most distinguishing characteristic of our constitution will be effaced.*"—(Middle Ages, Chap. viii, Part 2.)

To establish and confirm the rights set forth in King John's charter, cost, on the part of our English fathers, an almost continuous struggle from that period until the Revolution of 1688. Magna Charta was indeed always considered fundamental law, but the frequent encroachments made upon it by reigning monarchs rendered it necessary that it should oftentimes be confirmed. This was done frequently during the reign of the next Henry, and Sir Edward Coke reckons thirty-two instances in which it was solemnly ratified during the century that elapsed between the first Edward and Henry the Fourth.

Two centuries later came the reign of Charles I. An illustrious trial was now to be held between kingly prerogative on the one hand and legal government on the other. Greater encroachments were to be made on the liberties of the people, and in turn those liberties were to be more firmly established and more widely extended. Charles revived enormities which his father had not dared to practice. He violated the essential clauses of Magna Charta, as well as many subsequent laws made in accordance with those clauses and defending the rights and liberties of the subject. In the list of the grievances recited by our English fathers these are prominent: "illegal exactions," "*arbitrary commitments,*" "quartering of soldiers or sailors," and "*infliction of punishment by martial law.*" Against such encroachment on their ancient liberties guaranteed to them in the Great Charter four centuries before, they determined to provide an eternal remedy. That remedy they called the Petition of Right, and it constitutes the second great charter of English liberty. In it they pray the King:

"That no person hereafter be compelled to make or yield any gift, loan, benevolence, tax, or such like charge, without common consent by act of Parliament; and that none be called to answer or take such oath, or give attendance, or to be confined or otherwise molested or disquieted concerning the same, or for refusal thereof; and that no freeman in any such manner as is before mentioned *be imprisoned or detained;* and that your Majesty would be pleased to remove the said soldiers and marines, and that your people may not

be so burthened in time to come; and that the aforesaid *commissions for proceeding by martial law may be revoked and annulled;* and that hereafter no commissions of the like nature may issue forth to any person or persons whatever to be executed as aforesaid, lest by colour of them *any of your Majesty's subjects be destroyed or put to death contrary to the laws and franchise of the land.*"

This Petition of Right was ratified by Charles in the most solemn manner in the third year of his reign, whereby, says Macaulay, (Hist. of Eng., Vol. 1, Chap. 1), "he bound himself never again to raise money without the consent of the Houses, *never again to imprison any person, except in due course of law, and never again to subject his people to the jurisdiction of courts-martial.*"

In the sixteenth year of the reign of the same Charles the court of *star-chamber* was also abolished, to the general joy of the whole nation. This was a very ancient court, with an original limited jurisdiction, but long before the days of Charles had become an instrument of fearful oppression to the people of England, and that too in a manner strikingly analogous to the oppression of those who administer our own Government to-day. Its original legal jurisdiction was stretched, as Lord Clarendon tells us, (Hist. of Reb., book 1 and 3):

"To the asserting of all proclamations and orders of state; to the vindicating of illegal commissions, and grants of monopolies; holding for honorable that which pleased, and for just that which profited, and becoming both a court of law to determine civil rights, and a court of revenue to enrich the treasury; the council table *by proclamation enjoining to the people that which was not enjoined by the laws, and prohibiting that which was not prohibited;* and the star-chamber, which consisted of the same persons in different rooms, censuring the breach and disobedience to those proclamations by very great fines, imprisonments, and corporal severities; so that any disrespect to any acts of state or to the persons of statesmen, was in no time more penal, and the foundations of right never more in danger to be destroyed."

These two illustrious grants to civil liberty, to wit: the enactment of the Petition of Right and the abolishment of the court of star-chamber, belong indeed, sir, to the reign of Charles I.; but the heart of Charles went not with his grants. He was faithless and insincere. The eight remaining years of his life were spent in a struggle with the people against the very grants of liberty he himself had made. That struggle was fatal, as such struggles must ever be; and in 1649 the reign of this over-reaching and misguided King went down in darkness and blood.

The next great step in the establishment of the right of personal liberty to our Saxon fathers was taken in the nineteenth year after the restoration of Charles II. to the throne of England. It is certainly not unworthy of mention, sir, that during this reign the slavish tenures introduced by William the Norman, with all their oppressive appendages, were removed from incumbering the estates of the subject; but that which particularly concerns us now is the additional security of the person of the subject from imprisonment obtained by the *habeas corpus* act of 1679. "*Magna Charta*," says Blackstone," only, in general terms, declared that no man shall be imprisoned contrary to law: the *habeas corpus* act points him out effectual means, as well to release himself, though committed even by the King in council, as to punish all those who shall thus unconstitutionally misuse him." This act is, indeed, the great bulwark of the English constitution, and is scarcely less beneficial than the *charter* of Runnymede, and yet, sir, it only reaffirmed and made effectual to the people a right fully recognized and established long before. On this point I again introduce the testimony of Hallam:

"It is a very common mistake," he says, "and that not only among foreigners, but many from whom some knowledge of our constitutional laws might be expected, to suppose that this statute of Charles II. enlarged in a great degree our liberties, and forms a sort of epoch in their history. But, though a very beneficial enactment, and eminently remedial in many cases of illegal imprisonment, it introduced no new principle, nor conferred any

right upon the subject. From the earliest records of the English law, no freeman could be detained in prison except upon a criminal charge, or conviction, or for a civil debt. In the former case, it was always in his power to demand of the Court of King's Bench a writ of *habeas corpus ad subjiciendum* directed to the person detaining him in custody, by which he was enjoined to bring up the body of the prisoner with the warrant of commitment, that the Court might judge of its sufficiency, and remand the party, admit him to bail, or discharge him, according to the nature of the charge. *This writ issued of right, and could not be refused by the Court.* It was not to bestow an immunity from arbitrary imprisonment, which is abundantly provided in Magna Charta, if indeed it were not much more ancient, that the statute of Charles II. was enacted; but to cut off the abuses by which the *Government's lust of power*, and the servile subtlety of Crown lawyers had impaired so fundamental a privilege." (Constit. Hist. of England: Ch. XIII.)

From the reign of Charles II. we may date the complete restitution of English liberty, taken away by the Norman conquest. The glory of this belongs to the people, however, and not to the King. As it is written of him in the ancient records, "in truth he was a jolly King, and had a squeeze of the hand for every visitor and a jest for every occasion," and yet, like some other illustrious jesters, he demonstrates very well how, in England as well as in Denmark, a man "can smile, and smile, and be a villain." So far as the Second Charles himself is cancerned, the whole tendency and effort of his reign was to undermine the liberties of the people, and yet, in spite of that tendency and effort, the people wrested from him and established for themselves sufficient power to assert and preserve their liberty, whenever invaded by the royal prerogative. The cornerstone of their power and security was the *habeas corpus* act, by virtue of which, Lord Campbell says, "personal liberty has been more effectually guarded in England than it has in any country in the world;" a proud boast, sir, which America has hitherto disputed with the mother land, but which now, to her shame, she must yield.

The strength with which the liberties of the English people had been fortified by these successive struggles is well evinced in the memorable catastrophe of the next reign. For when James II., brother of the late King, attempted to enslave his subjects by obtaining the repeal of the *habeas corpus* act, which, Macaulay tells us, "he hated, as it was natural that a tyrant should hate, the most stringent curb that ever legislation imposed on tyranny," he found that Tories as well as Whigs were against him, and that the great writ was prized not less by the one than by the other. And afterwards, when he attempted to exercise the power of *dispensing with the operation of law as applied to particular individuals*, and imprisoned the seven Bishops because they refused to concur in said assumed power, the judges reaffirmed the rights of the subject, and James II. was driven from the throne of his ancestors. Nor were William and Mary permitted to ascend the throne until Parliament had set forth that there was an original contract between King and people, which James had broken, and had published a Declaration of Rights, in which they affirmed: "That the pretended power of suspending laws, and the execution of laws, by regal authority, without the consent of Parliament, is illegal; that the commission for creating the late court of commissioners for ecclesiastical causes, and all other commissions and courts of the like nature, are illegal and pernicious; that elections of members of Parliament ought to be free; and that the freedom of speech or debates, or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament."

The Bill of Rights, the Toleration Act, and the Act of Settlement, with its conditions, Blackstone tells us, "have asserted our liberties in more clear and emphatical terms; have confirmed and exemplified the doctrine of resistance, when the Executive Magistrate endeavors to subvert the constitution; and have maintained *the superiority of the laws above the King*, by pronouncing his dispensing power to be illegal."

The reign of Charles II. may be given as the period of the thorough and complete re-establishment of the civil and political liberties of England, but the revolution of 1688 is the happy era of their full and explicit acknowledgment and definition. From this day forth no monarch has dared attempt any serious infraction upon them. Amid all the commotions of subsequent years, amid party strifes, amid foreign wars, amid domestic insurrections, these liberties have stood unshaken, and their great palladium, the act of *habeas corpus*, has been kept safe within the temple, untouched by the sacreligious hand of King or Queen. To show how securely these liberties were guarded, and how far beyond the power of the King was the suspension of the writ of *habeas corpus*, and to what a limited extent only it might be interfered with even by act of Parliament, I need but refer you to the events of 1745. During this year England was disturbed at once by war abroad and rebellion at home. While the troops of George II. were on the Continent giving battle to the French, Charles Edward, the Pretender, asserted his right to the throne, and, at the head of Scottish clans, led by chiefs bearing such great names as Clanronald, M'Donald, and Cameron of Lochiel, marched forward and crossed the English borders. With a foreign war and a domestic insurrection on his hands at once, his best troops abroad, the land full of hidden enemies, and the fears of the loyal people justly aroused, now, if ever, the monarch might be expected to stretch his authority. The *habeas corpus* act was, indeed, suspended, but by whom and to what extent? Even then

"*The Executive power*," says De Lolme, in his admirable essay on the Constitution of England, "*did not thus, of itself, stretch its own authority;* the precaution was deliberated upon and taken by the representatives of the people; and the detaining of individuals, in consequence of the suspension of the act, *was limited to a certain fixed time.* Notwithstanding the just fears of internal and hidden enemies, which the circumstances of the times might raise, the deviation from the former course of the law was carried *no farther than the single point we have mentioned.* Persons detained by order of the Government were to be dealt with *in the same manner as those arrested at the suit of private individuals; the proceedings against them were to be carried on no otherwise than in a public place; they were to be tried by their peers, and have all the usual legal means of defence allowed to them—such as calling of witnesses, peremptory challenge of juries, etc.*"

Twenty years later (1765) Blackstone wrote his celebrated Commentaries on English Common Law. So clearly was the doctrine of the personal liberty of the subject established at this time, that he thus refers to it:

"In a former part of these Commentaries we expatiated at large on the personal liberty of the subject. This was shown to be a natural, inherent right, which could not be surrendered or forfeited unless by the commission of some great and atrocious crime, and which *ought not to be abridged in any case without the special permission of law.* A doctrine coeval with the first rudiments of the English Constitution, and handed down to us from our Saxon ancestors, notwithstanding all their struggles with the Danes, and the violence of the Norman conquest; asserted afterwards and confirmed by the conqueror himself and his descendants; and though sometimes a little impaired by the ferocity of the times, and the occasional despotism of jealous or usurping princes, yet established on the firmest basis by the provisions of *Magna Carta*, and a long succession of statutes enacted under Edward III. To assert an absolute exemption from imprisonment in all cases, is inconsistent with every idea of law and political society, and in the end would destroy all civil liberty, by rendering its protection impossible; *but the glory of the English law consists in clearly defining the times, the causes, and the extent, when, wherefore, and to what degree the imprisonment of the subject may be lawful.* This it is which induces the absolute necessity of expressing upon every commitment the reason for which it is made, that the court, upon an *habeas corpus*, may examine into its validity, and, according to the circumstances of the case, may discharge, admit to bail, or remand the prisoner." (Vol. iii. p. 133.)

Again, in speaking of those periods when the State may be in real danger, and it may consequently become necessary to abridge to some extent the liberties of the citizen by a temporary and limited suspension of the privileges of habeas corpus, he says:

"But the happiness of our Constitution is, that *it is not left to the executive power to determine when the danger of the State is so great as to render this measure expedient; for it is the* PARLIAMENT *only, or* LEGISLATIVE *power, that, whenever it sees proper, can authorize the Crown, by suspending the Habeas Corpus Act for a short and limited time*, to imprison suspected persons without giving any reason for so doing." (Vol. i. p. 136.)

To the same effect, Sir, are the unanimous decisions of the English courts since the revolution of 1688, nor had the doctrine thus set forth as to the personal liberty of the subject been in any way controverted since that period. This was the happy result of the successive struggles I have briefly sketched, since the day the Barons met King John at Runnymede. The right of personal liberty—in itself a natural right, inherent in every man—for our English fathers was now asserted, established, and defined by law, and a speedy and effective remedy provided for its infringement. The despotic idea of the divine right of kings had given way to the democratic idea of the divine right of the people; and the monarch, though he held a sceptre and wore a crown, was but the executive officer of their will. King, Lords, and Commons had united in the passage of the Habeas Corpus Act of Charles II.; they must unite again, Sir, before its provisions could be infringed upon in the least particular, or with reference to a single citizen. But the struggles of five centuries, the waste of treasure, and the flow of blood had accomplished for the people more than that. Even the united action of King, Lords, and Commons had its limits, which were well understood, well established, and soon reached. The personal liberty of the subject was secure, his house was his castle, and his rights were higher than kingly power. The time had come when, in the proud words of Lord Chatham, "the poorest man in his cottage may bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; *but the King of England can not enter it. All his power dares not cross the threshold of that ruined tenement.*"

In 1787 our own Constitution was formed. The American colonists had left behind them their homes and their native land, but not so, Sir, their rights and liberties under the laws of England. These were their birthright and their inheritance, and these were the companions of their exile. In more emphatic terms than ever, they gave expression to them in their early forms of colonial government. They are familiar with the right of personal liberty, and the more jealous of it because in part they had fled from oppression. They are familiar with the principle of Habeas Corpus, and engraft it in every Bill of Rights. And when the time came that the colonies were to separate from the mother country, and our Federal Constitution was finally formed, in an article devoted exclusively to the organization, powers, and duties of Congress, and in a section of that article devoted to limitations of those legislative powers, they inserted this clause:

"The privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it." (Art. I., Sec. 9.)

The second article of the Federal Constitution is devoted to the organization, powers, and duties of the Executive department, as the first to the organization, powers, and duties of the Legislative. If the framers of the Constitution had intended to confer the power of the suspension of habeas corpus, under any circumstances, upon the President, is it not most manifest that they would have inserted this clause in the second article, and not in the first—among the limitations of the powers of the Executive, and not among the limitations of the powers of Congress? Nor can it be said, Sir, that so important a clause as this was carelessly inserted. The right of the subject to the benefit of habeas corpus was, as we have seen, the most important point in controversy in the long struggle of centuries between monarch and people, between prerogative and popular lib-

erty, between arbitrary government and free institutions. The protection of this writ, and consequently of the liberties of the people against executive encroachment, must have engaged in an eminent degree the attention of men who had just rebelled against the authority of their old government, and were now employed in the formation of new, and, as they supposed, freer institutions. Since James II. had been driven from the throne for executive usurpation, no sovereign of England had pretended to the power of suspending habeas corpus in any emergency or under any circumstances. It was definitely and universally understood that Parliament alone possessed that power. The question with the framers of our Constitution, therefore, was, not whether the President will ever attempt the exercise of such power; of that they never dreamed; but will the legislative department, to which alone this power belongs, abuse its exercise? To guard against such abuse, they write this clause, and virtually say, that whereas Congress alone possesses the power of suspending the privilege of habeas corpus, yet even Congress shall not exercise this power "unless when, in cases of rebellion or invasion, the public safety may require it." In the words of the venerable Chief-Justice of the United States, "The introduction of these words is a standing admonition to the legislative body of the danger of suspending it, and of the extreme caution they should exercise before they give the Government of the United States such power over the liberty of the citizen." In view of which, I do not hesitate to affirm that the President, in suspending the privilege of the writ of habeas corpus throughout the entire Northern and Western States—States in which there is neither "rebellion" nor "invasion," where the courts are open, the laws in full force, and the officers of the law unimpeded in the discharge of their duties, and where, consequently, the "public safety" does not "require it"—has exercised a power to which Congress itself is not entitled under our Federal Constitution.

And yet, Mr. Speaker, this exercise of despotic power finds its appologists here; and members of this House, eminent for their legal learning, some of whose heads have grown white in its pursuit, have the astonding effrontery to affirm that our revolutionary fathers intentionally gave into the hands of their Chief Executive greater power in this respect than that possessed by the sovereign of England. Is it credible, sir, that an assembly of men, in whose veins ran Saxon blood; whose fathers had beheaded the First Charles, and driven the Second James from his throne, for violations of Magna Charta, and who had themselves just successfully rebelled against George III, assigning as a reason therefor, among others, that he had stretched his prerogative beyond just limits, in that he had "affected to render the military independent of and superior to the civil power;" in that he had "deprived them in many cases of the benefits of trial by jury;" and in other things of like nature, written in the Declaration of Independence,—is it credible, sir, that such men, descended from such fathers, and having achieved such ends, should now commit into the hands of one man, chosen from among themselves, every guarantee of PERSONAL LIBERTY which their fathers had gained by the struggles of a thousand years, and for a higher and clearer assertion of which they themselves had just passed through the dark trials of the revolution? Such pretended arguments from such men serve but to show the weakness of their cause, and how even the learned in the law, when in the advocacy of a bad case, will sometimes condescend to the bold assertions and untenable positions of the petifogger.

But the framers of our Constitution did more for the establishment and protection of the personal liberty of the citizen than the mere insertion of this clause restricting the power of Congress in the suspension of the writ of habeas corpus. That Constitution, sir, was the work of men who breathed the air of freedom, and who, in the cause of freedom, had "pledged their lives, their fortunes, and their sacred honor." The great God had given success to their efforts,

and now they were to form an instrument that should perpetuate this freedom to the latest generations of men. The instrument is worthy of the framers, and breathes their spirit throughout.

In nothing is this spirit more manifest than in the careful manner in which they restrict and guard Executive power. They had learned by experience to be jealous of this department of government; they knew its tendency to usurpation; and so far from extending its power, confined it within narrow limits. In the words of Chief Justice Taney, "they carefully withheld from it many of the powers belonging to the Executive branch of the English Government, which were considered as dangerous to the liberty of the subject—and conferred (and that in clear and specific terms) those powers only which were deemed essential to secure the successful operation of the Government." They limit the President's term of office to four years, and make him personally responsible for his conduct by providing for his impeachment in case of malfeasance. He is indeed, "commander-in-chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States," but Congress alone has power to make the necessary appropriations for the support of said army and navy. The militia of the several States, when in the actual service of the United States, are indeed under his command, but "the appointment of the officers is reserved to the States, as a security against the use of the military power, for purposes dangerous to the liberties of the people or the rights of the States." His civil powers are as carefully restricted as his military, so that he cannot appoint officers or make treaties, without the consent of one or both branches of the legislative department. A few brief lines of the Constitution explicitly enumerate all his powers and prescribe all his duties.

But the Constitution of the United States goes further than this in the establishment and security of the personal liberty of the citizen. It imposes other restrictions upon the government, and asserts other rights for the people, among which are the following:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; *or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble*, and to petition the government for a redress of grievances." (Art. I., Amendments.)

"A well regulated militia being necessary to the security of a free State, *the right of the people to keep and bear arms, shall not be infringed.*" (Art. II., Amendments.)

"The right of the people to be *secure in their persons, houses, papers and effects*, against unwarrantable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." (Art. IV., Amendments.)

What are unreasonable searches and seizures? We are given to understand by grave members of this body, that a seizure is only then unreasonable when the person seized has not been guilty of crime. The interpretation is incorrect and falls short of the meaning of the clause. A seizure is unreasonable whenever made *without warrant* issued upon probable cause, supported by oath, and describing the person.

"No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, * * * * nor be deprived of life, liberty or property without due process of law." (Art. V., Amendments.)

"Due process of law," I need not say, is judicial process—the process of the courts and officers connected with them. It follows, therefore, that the President of the United States has no power to arrest any citizen, not connected with the military service, with whatever offense against the United States he may be

charged, and whatever evidence there may be of his guilt; and much more, that he has no power to authorize any other officer, whether civil or military, to make such arrests.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State or district wherein the crime shall have been committed (which district shall have been *previously* ascertained by law), and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." (Art. VI., Amendments.)

Wherefore it follows that even though the privilege of the writ of habeas corpus may have been legally suspended by act of Congress, and a citizen arrested and imprisoned by "due process of law," he still could not be *detained in prison or brought to trial before a military tribunal*, because by the terms of this Article the founders of our Government decree that he "*shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed.*" This is manifestly a correct interpretation of the rights of the citizen under this Article, and it is precisely the same doctrine which De Lolme tells us prevailed in England when Parliament suspended habeas corpus at the time of the invasion of Charles Edward the Pretender.

Every one of these guarantees of personal liberty to the subject has been reiterated in almost precisely the same words in the Constitution of our own State, and so clear and evident is their meaning that I need not stop to discuss to what extent they have been violated by the proclamation of the President, and by the military arrests of our citizens and their subsequent detention in prison. The Executive has not only assumed powers which belong exclusively to the coördinate departments of government, *but powers which the people have never delegated to any department, and which all three combined could not constitutionally exercise.*

I do not, of course, deny the right of the Executive to issue proclamations. There are many precedents for that both in England and America, but in neither of these countries is it the legitimate use of a proclamation either to make law or to suspend law, or to interfere in any way with the processes of law, but *only to announce what law is and to warn against its violation.* This proclamation, usurping as it does legislative power in the suspension of a judicial process, has no precedent in American history, and none in English history since James II laid claim to "dispensing" power and was driven from his throne. It is not an English proclamation, it is a Spanish pronunciamento, and many like unto it may be found in the history of that despotic government.

But a venerable and learned member of this body has attempted to deduce this power of the President from the terms of his oath of office, wherein he swears, "faithfully to execute his office" and to "preserve, protect, and defend the Constitution of the United States;" by virtue of which oath, we are told, "he is vested with the whole power of the people, * * * and may neither ask Congress, Cabinet, or men." Now I utterly deny that there is any possible sense in which the President may be said to be "vested with the whole power of the people," or that he is charged with the duty to "preserve, protect, or defend the Constitution," in exclusion of or superiority to the legislative or judicial department. He is sworn "faithfully" to discharge the duties of his "*office.*" That office is one of limited grants, the powers and duties of which are clearly defined in the Constitution he is sworn to protect. Outside of these prescribed duties and powers he has no more authority than any other citizen, and he is as much sworn to "protect" the Constitution against usurpation or invasion on his own part as against usurpation or invasion on the part of others.

In the third section of the second article it is made a duty of his "office" that "he shall take care that the laws be faithfully executed;" but this does not authorize him to execute laws himself, nor through agents or officers, whether civil or military, of his own appointment. He is to take care that the laws be faithfully executed, and that they be executed in the manner prescribed by the Constitution and the laws themselves, as expounded and adjudged by the judicial department of government. But he certainly can not be said to "take care that the laws be faithfully executed" when he usurps legislative power by suspending the writ of habeas corpus, and judicial power by arresting and imprisoning the citizen of his own exclusive authority. The legislature and the judiciary are co-ordinate and not subordinate departments of government, and the executive has no more authority to execute their functions, by making or suspending law, or by exercising the processes of the courts, than any other citizen. As no argument for this can be deduced from the nature of the executive office under the Constitution, so neither can any argument be deduced for it from the nature of sovereignty, or the necessity of government for self-defense in times of tumult and danger. The President asks if it is not better that he should violate one law than that others should be permitted to violate many. In the light of his official oath, solemnly sworn in the presence of God and man, I answer, no! It is not better that he should violate any law. Let him "*faithfully execute the office of President,*" then, come what may, he is not responsible. Let him remember, if "it must needs be that offences come," that the "wo" is pronounced only on "that man by whom the offence cometh." Let him rather heed the words of the Father of his Country, in his Farewell Address to the American people:

"LET THERE BE NO CHANGE BY USURPATION; FOR THOUGH THIS, IN ONE INSTANCE, MAY BE THE INSTRUMENT OF GOOD, IT IS THE CUSTOMARY WEAPON BY WHICH FREE GOVERNMENTS ARE DESTROYED. THE PRECEDENT MUST ALWAYS GREATLY OVERBALANCE, IN PERMANENT EVIL, ANY PARTIAL OR TRANSIENT BENEFIT WHICH THE USE CAN AT ANY TIME YIELD."

Moreover, in the words of one of our most learned jurists, "The Government of the United States is one of delegated and limited powers. It derives its existence and authority altogether from the Constitution, and neither of its branches, executive, legislative, or judicial, can exercise any of the powers of government beyond those specified and granted." This doctrine is clearly and emphatically set forth in the tenth article of the amendments to the Constitution:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The States, and the people of the States, these are the source of whatever power pertains to the Federal Government, and with them is the residuum of power. What the States have delegated, belongs to the Federal Government; what they have not, vests in themselves. What the people of any State have delegated, belongs to the State Government; what they have not, as before, abides with them. Thus our fathers overturned the old despotic ideas, and the people of America became citizens, and not subjects; sovereigns, and not slaves.

Even if it were true, Mr. Speaker, that the power to suspend the privilege of the writ of habeas corpus vested under certain circumstances in the President, yet certainly the most enthusiastic advocate of executive power could not therefore pretend that there vested in him also the power to set aside all these other express and unmistakable constitutional guarantees of personal liberty to the citizen, and that he was therefore entitled to trample under foot the provisions of our State Constitution, to annul our State laws, to institute new and unknown offenses, to substitute the report of some deputy provost-marshal for the presentment of a grand jury, to arrest the citizen by officers, whether civil or military, of his own appointment, to disregard judicial forms, to detain in prison, to deny

a "speedy trial," or to substitute a military commission for a judicial court and jury required by the Constitution.

For the correctness of the proposition, however, that the power to suspend the privilege of the writ of habeas corpus vests exclusively in the legislative, and not at all in the executive department of our government, I have still another argument to adduce. In addition to the arguments already set forth, drawn from the history of the writ, the decisions of the English courts, the analogies of the two governments, the express words and the context of our own Constitution, I am able, finally, to array in favor of this opinion the uniform decisions of our American courts and opinions of our American jurists. In addition to the great English names of Coke and Blackstone and Hale and Mansfield, already adduced, I have yet to adduce the equally great American names of Marshall and Kent and Story and Taney. Mr. Justice Story, whose name will ever live in the history of American jurisprudence, whose authority is of the highest kind, and who was for a long time a member of the Supreme Court of the United States, thus speaks of the writ of habeas corpus in his Commentaries on the Constitution:

"Hitherto no suspension of the writ has ever been authorized by Congress since the establishment of the Constitution. It would seem, *as the power is given to Congress to suspend the writ of habeas corpus in cases of rebellion or invasion*, that the right to judge whether the exigency had arisen must exclusively belong to that body." (3 Com. on Constitution, Sec. 1336.)

But we are told by the honorable member from Montgomery that this is only "the opinion of an author writing a book," and therefore not "to be received without question." It is true, Mr. Speaker, that Justice Story, in erecting that great monument to his own genius, his "Commentaries on the Constitution," was *only* "writing a book," *only* forming public opinion, *only* instructing the American people in their political rights and duties, *only* instilling sentiments into the minds of young men. Only "writing a book"! a book that is studied in every literary college and school of law in the land; a book that is read by every young man who hopes to rise to a place of influence and distinction among his fellows; a book to be found in almost every library, and whose sentiments and teachings will live forever. Only a book! and yet a book in view of which Story might have repeated the lines of Horace with more truth than the author himself:

"Exegi monumentum ære perennius,
Regalique situ pyramidum altius."

But I am willing to concede much, Mr. Speaker, to the prejudices of an old lawyer in favor of judicial decisions, and my next quotation shall not be from "the opinion of an author writing a book," but in accordance with his own terms, from "a legal decision, prepared for the bench with all the care of a conscientious judge;" and that judge shall be none less than Chief-Justice Marshall, and that bench none less than the Supreme Court of the United States, in delivering the opinion of which, more than half a century ago, when Jefferson was President, he used these words:

"If at any time the public safety should require the suspension of the powers vested by this act (*habeas corpus*) in the courts of the United States, *it is for the* LEGISLATURE *to say so. That question depends on political considerations, on which the* LEGISLATURE *is to decide.* Until the legislative will be expressed, this court can only see its duty, and must obey the laws." (4 Cranh. 101.)

To the same effect is the decision of Chief-Justice Kent of the Supreme Court of New York, in 1813. (*In re* Stacey, 10 Johnson, 328.) And the same doctrine was reiterated by the Supreme Court of Louisiana, in 1815, in the case of Johnson *v.* Duncan. (3 Martin, 531.) The honorable member from Cuyahoga

has told us that this is a matter about which the opinions of judges are pretty equally balanced, and yet that member, with all his skill as a lawyer, and with all his powers of research, has failed to produce decisions contrary to those to which I have referred; nor has this been attempted by the member from Montgomery, or by the member from Logan. I think I am safe in asserting, Sir, that from the establishment of our courts until the year of grace 1861 no such opinion was ever asserted by any respectable court or by any respectable lawyer. I know, Sir, that since the advent of the present Administration there are some who, for political considerations, have "denied the faith" and have gone "contrary to the doctrine which they have learned"—the Attorney-General, who issues an apology for what the President has already done; certain lawyers, who seek to be made Judges of the Supreme Court, or Brigadier-Generals; and Representatives in this General Assembly, who feel bound to defend their party, right or wrong. In opposition to all this, Sir, even in the midst of these degenerate days, I am able to adduce the testimony of one who comes down to us from the pure days of the fathers, who is laden with the garnered wisdom of many a year, and who embodies in himself all the constitutional and legal learning of the age.

"Clarum et venerabile nomen!"

"Serus in cœlum redeas!"

I refer, Sir, to the opinion of Chief-Justice Taney, of the Supreme Court of the United States, delivered on the 1st of June, 1861, in the case of *ex parte* John Merryman. The whole opinion constitutes an able defense of the right of personal liberty to the American citizen, and is worthy of its learned and venerable author. I shall quote but a few of his clear and emphatic sentences. Referring to the extraordinary claim of power made by the President, and knowing how utterly at variance it was with all established opinion and with all previous practice in this country, he said:

"I certainly listened to it with some surprise, for I had supposed it to be one of those points of constitutional law upon which there was *no difference of opinion, and that it was admitted on all hands that the privilege of the writ could not be suspended* EXCEPT BY ACT OF CONGRESS.

And further on, after discussing the extent to which the rights of the citizen had been infringed by this arrest and imprisonment, he again says:

"The Constitution provides that 'no person shall be deprived of life, liberty, or property, without due process of law.' It declares that 'the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons and things to be seized.' It provides that the party accused shall be entitled to a speedy trial in a court of justice.

"And these great and fundamental laws, which Congress itself could not suspend, have been disregarded and suspended, like the writ of *habeas corpus*, by a military order, supported by force of arms. Such is the case now before me; and I can only say, that if the authority which the Constitution has confided to the judiciary department and judicial officers may thus, upon any pretext or under any circumstances, be usurped by the military power at its discretion, the people of the United States are no longer living under a government of laws, but every citizen holds life, liberty, and property at the will and pleasure of the army officer in whose military district he may happen to be found."

Such, Mr. Speaker, is the history of this ancient and sacred right of PERSONAL LIBERTY, such the doctrine concerning it in England, such the guarantees and safeguards of our own Constitution, and such the opinions of our American jurists and decisions of our American courts. It is vain, Sir, for the President, the Attorney-General, or the advocates of arbitrary power upon the floor of this

House, to attempt to deduce a sanction of such authority as that assumed by the present Chief Executive from our Federal Constitution. Its history, its spirit, its words, its context, and its uniform interpretation, are all against them.

But the President, in his message to which I have referred, does not rely wholly on his authority under the Constitution, and neither do all his apologists who have spoken in the course of this debate. He intimates that he has power, notwithstanding the Constitution, and that there are circumstances under which he may set aside its restrictions. This idea receives a bolder embodiment in his address to the clergymen of Chicago, in which he says, with reference to a scheme they were proposing:

"Understand, *I raise no objection against it on legal or constitutional grounds;* for, as Commander-in-Chief of the Army and Navy, in time of war, I suppose *I have a right to take any measure which may best subdue the enemy.*"

These words were spoken, it is true, with reference to the issue of an executive proclamation abolishing slavery in the States; but the assumption of a power to disregard constitutional rights in one respect is equally potent for their disregard in another. The same authority by virtue of which the President issues the proclamation of September 22d, in acknowledged violation of the constitutional guarantees of the right of PROPERTY, is the authority by virtue of which he issues the more dangerous proclamation of September 24th, in violation of the constitutional guarantees of the right of PERSONAL LIBERTY. It is the assertion, on the part of the President, of a power inherent in himself, as Commander-in-Chief of the Army and Navy, by virtue of which he may set aside both constitutions and laws. It is the famous "WAR POWER," of which we hear so much, and which we are told is based on the necessities of the people and the safety of the nation. This "war power" is indeed a great power, if all be true its friends on this floor have asserted concerning it. Armed with this power, the President may not only emancipate the slaves and suspend the writ of habeas corpus, but he may make laws respecting an establishment of religion, and prohibit the free exercise thereof; he may abridge the freedom of speech and of the press, and the right of the people peaceably to assemble and to petition the government for a redress of grievances; he may infringe the right of the people to keep and bear arms; he may arrest the citizen without warrant; he may imprison him without indictment of a grand jury; he may deprive him of life as well as liberty and property, without process of law; he may deny him the right to trial by jury, the right to be informed of the nature and cause of the accusation, the right to be confronted with the witnesses against him, the right to have compulsory process to obtain witnesses in his favor, and the right to have the assistance of counsel for his defense; he may require excessive bail, impose excessive fines, and inflict cruel and unusual punishment; he may unite in himself all legislative and judicial, as well as executive power, and make perpetual his term of office; he may utterly overthrow our political institutions, and make the freest government on earth the most despotic.

But let us analyze this famous war power under which we are told all these things can be done. Let us see of what powers the President of the United States is possessed as a military officer over and above those of which he is possessed as a civil officer. Let us examine the foundation of the claim that *in his military capacity he is superior to the Constitution and the laws*, and may set both aside whenever in his judgment he can thus best accomplish a given end.

Much misapprehension prevails, Mr. Speaker, with reference to the military authority of the President and its relation to the safeguards, restrictions, and regulations of the Constitution and laws in time of war. In despotic governments, where all powers unite in one person, the military commander may have

unbounded authority, but in this country as in England there is nothing vague uncertain, or arbitrary in the exercise of the military authority of the President any more than in the exercise of his civil authority,—in time of war, any more than in time of peace. Whatever authority the President of the United States possesses and exercises as a military officer, he *possesses and exercises under law* just as much as he possesses and exercises under law his authority as a civil officer. This law is two-fold, embracing what is commonly known as *Military* law and *Martial* law. The two are totally distinct, though they have been much confounded in the course of this discussion. Outside of these two there is no such thing as "war-power,"—a word to be found in no dictionary, and apparently invented to mislead. What then is Military Law? It is written partly in the Constitution and partly in the Acts of Congress. By the terms of the Constitution the President is made "Commander-in-Chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States." He holds this position by *force* of the Constitution, it is true, but it is equally true that he holds this position *under and in subordination* to the Constitution, and that in his conduct in this capacity he is to be governed by the terms of that instrument and by the military laws and articles of war *enacted by Congress in accordance with it.* To that Constitution and to those laws and articles so enacted he owes precisely the same obedience as "Commander-in-Chief," that he owes to the Constitution and civil laws as President. Nor has he any more power in any way over the military laws and articles of war than he has over any other laws. He possesses no legislative power in this capacity. He can not make military law. He can not make an article of war. He can not alter or suspend either the one or the other. He may issue orders for the government of the army, but only in subordination to and in accordance with the Constitution and the military laws and articles of war previously enacted by Congress for such regulation and government.

But for whose regulation and government, Sir, are these military laws intended and over whom does this military power of the President extend? Military law, the exercise of military authority, pertains only and exclusively to *military men.* It is for the *soldier* and not for the *citizen.* The army, the navy, the militia in actual service, these and these alone are subject to military government, may be arrested by military officers, tried by military courts, and punished with military penalties. It is part of the contract into which they enter when they cease to be citizens and become soldiers. But even a soldier can be tried by court martial only for violation of military law, which includes no other offenses than those against discipline and the good order of the service. For any crime against civil law he must be delivered to the civil authorities and tried by the civil courts. How much less then can a citizen, for a real or supposed crime against his country, be subjected to the authority of military officers and to the punishment of military courts. Military law thus bears exclusive relation to military men, and has nothing whatever to do with the citizen. This has always been the doctrine in England since the enactment of the Petition of Right, and no other doctrine has ever before been pretended in this country.

It remains only to discuss Martial law. Martial law is the law of the sword, the law of force. It is an unwritten law, *lex non scripta,* that exists nowhere except in the will and judgment of such military commander as chooses to exercise unlimited authority over life, liberty, and property. Blackstone tells us that "martial law, which is built upon no settled principles, but is entirely arbitrary in its decisions, is, as Sir Matthew Hale observes, in truth and reality, no law; but is something indulged rather than allowed as a law." An eminent and learned Justice of our own country describes it in these vigorous words: "By it (martial law) every citizen, instead of reposing under the shield of known and fixed laws as to his liberty, property, and life, exists with a rope round his

neck, subject to be hung up by a military despot at the next lamp-post, under the sentence of some drum-head court-martial."

It certainly is a matter of very grave importance, Mr. Speaker, to every citizen, to know *to what extent* such law as this may prevail in our own country, and over whom such absolute authority may be exercised. In England, since Charles I. lost his head and James II. his crown, no monarch has attempted to institute such law within that realm. It was one of the articles of the Petition of Right, "that no commission shall issue to proceed, *within this land*, according to martial law." More than two centuries ago the free spirit of our English fathers could not brook its despotism, and the doctrine that has ever since obtained concerning it in that country, is thus laid down by Lord Loughborough:

"In the preliminary observations upon the case, my brother Marshall went at length into the history of those abuses of martial law which prevailed in ancient times. This leads me to an observation that martial law, such as it is described by Hale, and such, also, as it is marked by Mr. Justice Blackstone, *does not exist in England at all.* Where martial law is established and prevails, in any country, it is of a totally different nature from that which is inaccurately called martial law merely because the decision is by a court-martial, but which bears no affinity to that which was formerly attempted to be exercised in this kingdom; which was contrary to the Constitution, and which *has been for a century totally exploded.* * * * * * * * *

"In the reign of King William, there was a conspiracy against his person in Holland, and the persons guilty of that conspiracy were tried by a council of officers. There was, also, a conspiracy against him in England; *but the conspirators were tried by the common law.* And, within a very recent period, the incendiaries who attempted to set fire to the docks at Portsmouth, were tried by the common law. In this country, all the delinquencies of soldiers are not triable, as in most countries in Europe, by martial law; but, where they are ordinary offenses against the civil peace, they are tried by the common-law courts. *Therefore, it is totally inaccurate to state martial law as having any place whatever within the realm of Great Britain.*"—(Grant *v.* Gould, 2 H. Bla. 69.)

Now will any one pretend that, while the subjects of a limited monarchy are thus protected in their natural rights and secured against oppression, the citizens of free America, in the words of Judge Derbigny, spoken a half century ago, "are left at the mercy of the will of an individual who may, in certain cases, *the necessity of which is to be judged of by himself*, assume a supreme, overbearing, unbounded power! The idea is not only repugnant to the principles of any free government, but subversive of the very foundations of our own."

Under our Constitution Congress has power to declare war. The power to declare war implies, of course, the power to resort to the usual and necessary means of carrying it on. By virtue of this the commander of any force, as well as the Commander-in-Chief, may do whatever is necessary and is in accordance with the laws of civilized warfare, to accomplish the purpose of his command. All this, it is evident, is a fair deduction of power from the Constitution and laws, and is in no way antagonistic to them or subversive of them. Such commander may also proclaim martial law, and assume control of citizens as well as soldiers. But for what time, over what extent of territory, and to what degree may he do this? I answer, only so far forth as is *absolutely necessary to the accomplishment of his purpose;* and if he overstep these limits he does so at his peril. He may proclaim martial law over such space as *then and there* is the scene of warlike operations. When battle is imminent, he may rule by such authority a camp, a besieged city, the space between two hostile armies, or other territory within the sphere of his actual operations in the field. At such time and within such limits he may disregard the civil rights of the citizen just so far as is absolutely necessary and no farther. He may institute martial law within the lines of his army, and appoint military commissions to try offenders against civil rights when in a foreign country or other place where there are neither courts of justice nor civil officers. But no sane man will pretend that the Com-

mander-in-Chief, or any or all other commanders combined, can therefore institute martial law in States and Territories remote from warlike operations, where the courts are open, where the judicial officers are unimpeded in the discharge of their duties, and where consequently all offenders may be tried and punished in the manner prescribed by the Constitution and by the laws of Congress and of the States. The only martial law our Constitution and the genius of our government will tolerate under such circumstances is that which I have heretofore discussed, namely, the suspension by Congress of the privilege of the writ of Habeas Corpus for a limited time and within such districts as the public safety may require, authorizing however neither military arrests nor military imprisonments. This is not martial law at all, and I am able to make the same boast for my own country that Lord Loughborough, whom I have already quoted, did for England, that outside of these exceptional emergencies connected with actual military operations in the field, "it is totally inaccurate to state martial law as having any place whatever within" the Republic of the United States.

As there is no precedent in the history of England for two hundred years for the proclamation of martial law, so is there none whatever in the history of this country. Washington did not proclaim it, as is sometimes falsely asserted, at the time of the Whisky insurrection in Pennsylvania, but issued to his soldiers these instructions:

"That every officer and soldier will constantly bear in mind that he comes to support the laws, and that it would be peculiarly unbecoming in him to be, in any way, the infractor of them; *that the essential principles of a free government confine the province of the military, when called forth on such occasions, to two objects:* first, to combat and subdue all who may be found IN ARMS in opposition to the national will and authority; secondly, to aid and support THE CIVIL MAGISTRATES in bringing offenders to justice. THE DISPENSATION OF THIS JUSTICE BELONGS TO THE CIVIL MAGISTRATES; AND LET IT EVER BE OUR PRIDE AND OUR GLORY TO LEAVE THE SACRED DEPOSIT THERE INVIOLATE." (Irving's Life of Washington, vol. 5, ch. 25.)

The example of Jefferson has been appealed to by those who would here apologize for Mr. Lincoln, but it will not bear them out. When the whole country was filled with alarm by reason of Burr's conspiracy, and certain information concerning it was sent to Congress, the Senate unanimously passed a bill suspending the privileges of the writ of *habeas corpus* for three months, which the House almost as unanimously rejected. President Jefferson did not attempt its suspension of his own power, as no other but President Mr. Lincoln ever did. Mr. Jefferson did not even recommend the measure to Congress, nor did he authorize the arrest of Bollman and Swartwout. As soon as the prisoners reached Washington they were taken before the Circuit Court, examined, and then committed for trial. Shortly after they were taken from prison on a writ of *habeas corpus*, and discharged. Let not the apologists of military power attempt to array upon their side the man who in his Inaugural Address, March 4th, 1801, announced, among others, these two as "essential principles" of our Government: First, "THE SUPREMACY OF THE CIVIL OVER THE MILITARY AUTHORITY;" and second, "*Freedom of person, under the protection of the habeas corpus.*"

But the honorable gentleman from Logan tell us that "General Jackson exercised martial authority at New Orleans when the invading army of Packenham was marching against the city." That is true; but it is by no means true that the conclusion at which he arrives follows as a logical sequence—a proposition that might be generalized as to the honorable gentleman's conclusions without doing much violence to truth. General Jackson did indeed proclaim martial law *within the limits of a besieged city at a time when*, as the member from Logan says, *the invading army of Packenham was marching against it.* Does it follow as a logical sequence from this that the President, as Commander-in-Chief, may proclaim martial law throughout the length and breadth of the land, in States

and Territories where there is neither invasion nor insurrection? Moreover, th Government expressly disapproved even of this exercise of martial authority b Gen- Jackson, and, limited and seemingly necessary as it was, the District Cou of Louisiana decided that he had overstepped the bounds of legitimate powe and had violated the Constitution and the laws. Then it was that the militar hero *vindicated the majesty of the law by submitting to the punishment it choo to inflict.* The defender of New Orleans, the deliverer of his country from foreig invasion, at the head of a victorious army, followed by an excited multitude, ar sustained by thousands of munificent and devoted friends, bowing in humb submission to the authority of an unarmed and unguarded Court, can hardly b plead as a precedent for usurpation of judicial power and disregard of judici processes.

The venerable member from Montgomery has attempted to find a precede for the establishment of martial law throughout the country in the condition affairs in Rhode Island during the Dorr rebellion, and authority for it in the d cision of Chief Justice Taney in the case of Luther *v.* Borden, occurring in tha connection. But the authority cited by the honorable member by no means su tains his proposition. The question before the Court in this case was not qnestion of Executive authority under the Constitution of the United States, n was it a question of Executive authosity at all, but whether the LEGISLATURE Rhode Island, under the existing form of Government in that State, had or ha not power to declare martial law within its limits. This had already been d cided in the affirmative by the State authorities, and that decision was conclusiv on the United States Court. I do not deny that the Constitution of any Stat might be so written as to give into any hands the people of that State choos the power temporarily to declare martial law. I do not deny that the Constitu tion of the United States might have been so written as to give into the hand of Congress or the President, or any other man, the power to declare martial la with as much rigor as that with which Queen Mary put it in force in Englan three hundred years ago. But the question is, was it so written? That questio was not touched upon in the case of Luther *v.* Borden, referred to by the membe from Montgomery, in the remotest degree; and it is a strange ignorance in on so wise, or a still stranger perversity in one so good, that would lead to the us of a garbled extract from the remarks of the Chief Justice in that case, for th establishment of an opinion entirely contradictory to the opinion expressed b him in the Merryman case, to which I have already referred, and in which th question of Executive authority, under the Constitution of the United State was directly before the Court.

These are the only precedents and authorities that have been urged in beha of this supposed doctrine of martial law, and a casual review of them evince how far they fall short of its establishment. Under this examination, too, th vague and terrible outlines of this mysterious "war power," grow distinct, si and its huge proportions sensibly diminish. What, then, are the powers of th President as Commander-in-Chief in time of war? I answer: Over all person connected with the army, the navy, and the militia in actual service, he ha military power and command. He may issue orders for their government an regulation. They may be arrested by military officers, tried by military court and punished with military penalties for all breaches of discipline and goo order in the army. But all this must be done *in subordination to, and in th manner prescribed by, the Constitution; and the military laws and articles of wa enacted by Congress.* This military authority pertains exclusively to *soldiers.*

I answer further, that, over all persons and property within the limits of actua warlike operations in the field, and at the time of such warlike operations, h may exercise such authority as is necessary to accomplish the purpose of hi command. And when in a foreign country or elsewhere the courts of justice ar

not accessible, he may institute military commissions for the trial of offenses against civil laws, whether committed by soldiers or others within the lines or immediate neighborhood of his army, and through these military commissions may inflict the punishments prescribed by such laws.

Of "war power," beyond this, there is none, sir, vesting either in the President of the United States or in any inferior commander. But it is most manifest that the proclamation of the President, and the proceedings under it in the form of the military arrest and arbitrary detention of our citizens, can find no justification in these principles, and entirely overstep these boundaries and limitations. On what, then, are these proceedings based? I will answer that question in the words of a late Judge of the Supreme Court of the United States, a man eminent for his legal learning, and who never belonged to that party which is here so freely charged with being disposed to find fault with a legitimate exercise of power.

"They spring," says Mr. Justice Curtis, "from the assumed power to extend martial law over the whole territory of the United States; *a power for the exercise of which by the President, there is no warrant whatever in the Constitution; a power which no free people could confer upon an Executive officer and remain a free people.* For it would make him the absolute master of their lives, their liberties, and their property, with power to delegate his mastership to such satraps as he might select, or as might be imposed on his credulity or his fears."

Mr. Speaker, I have thus discussed at much greater length than I intended the nature of the power claimed by the President and the grounds he assigns for its exercise. I have attempted to show that no such power is conferred upon him by the Constitution or can be exercised without its violation; and that no such power is implied in his position as Commander in-Chief of the army and navy and of the militia in actual service. I have not done this, sir, with a fault-finding disposition nor in a captious spirit toward the Administration. Such spirit or such disposition does not become the grave and fearful exigencies of the times. To the Administration in its hour of peril I am willing to accord a hearty support in the full exercise of all its constitutional powers. Those constitutional powers I believe to be sufficient for the maintenance of the Government and for the accomplishment of every legitimate purpose. I protest against Executive usurpation because I believe it is calculated to hinder rather than hasten the end dear alike to us all—of the restoration of our old and honored Union. I protest against Executive usurpation, because if I have read history to any purpose, such usurpation is the customary weapon by which free governments are destroyed. I have long listened, sir, with pain and with fearful forebodings, to the openly expressed disregard for our Federal Constitution, its provisions and limitations, on the part of those high in authority in this land. With pain and with fearful forebodings I have heard those expressions reiterated in the course of this debate. Sir, what words of folly are these that are beginning to pass almost as a maxim in the mouths not only of the people, but of those who should be their teachers—that "the Constitution was made for the country, and not the country for the Constitution!" This Constitution was indeed *made* for the country, and for the country it must be *preserved;* else all that is of value in that word country is lost to us forever. Sir, what words, I will not say of folly, but of madness, are these, which have found their way into the mouths even of lawyers and statesmen—that "the safety of the people is the supreme law;" a translation of the old despotic maxim, *salus populi, suprema lex!* The Constitution, sir, is the only "supreme law" of this land, and its provisions and restrictions the only "safety." Destroy that, and there is neither safety nor law, except as it is to be found in the uncontrolled will and judgment of one man. Destroy that, and our portion is either DESPOTISM or ANARCHY. I cannot believe, sir, that safety lies in the way of despotism, or that the people of this land are prepared to accept it. The

alternative, I do not hesitate to say, is even worse. Sir, I learned, long ago, in Aristotle, that "the rule of a mob is the worst of tyrannies."

Τυττων των τυραννιδων τελ.ευταια ἡ δημοκρατια.

I have learned the same lesson in the caprices of the Athenian Democracy; I have learned it in the proscriptions of the French revolution. Heaven forbid that I should learn it again in the spirit of lawlessness that is beginning to prevail among the people of this Republic.

From this dread dilemma I know of but one way of escape. It is found in a strict adherence to the letter and spirit of our Federal Constitution. I know, sir, that in giving utterance to this sentiment I lay myself open to the largest extent to the charges so abundantly brought in this House and elsewhere against those who clamor for CONSTITUTIONAL LIBERTY. If it be a crime to plead for that which has hitherto been the crowning glory of this nation, and which our fathers have han led down to us as our best birthright and noblest in heritance, then, sir, I am guilty. If it be a crime to love the Constitution under which I was born, to which I owe the abundant privileges of my youth and manhood, and around which cluster all my hopes for the future, then, sir, again I am guilty. To that Constitution, sir, we owe all our national greatness; to that Constitution we owe all our national privileges. It is the palladium of our liberties, the foundation of our free institutions, the guarantee and protection of our civil and political rights. Let others do what to them seems best. As for me, in these dread days of doubt and darkness, I will plant my feet on the Constitution of the Union as the only rock of support. Living, I will stand there, and there I will die. "And," in the words of a great American statesman, whose fame shall increase with the ages, "should I leave no other legacy to my children, by the blessing of God, I will leave them the inheritance of free principles and the example of a manly, independent, and constitutional defense of them."